LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-1371

---

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

GREAT COASTAL EXPRESS, INC., *Respondent.*

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

## REPLY MEMORANDUM FOR PETITIONER

---

SIDNEY DICKSTEIN
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037
*Attorneys for Petitioner*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

BLEED THR

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-1371

---

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

GREAT COASTAL EXPRESS, INC., *Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

---

## REPLY MEMORANDUM FOR PETITIONER

---

### A. THE QUESTIONS PRESENTED ARE PROPERLY HERE.

Respondent first asserts that the petition "creates only a fictitious 'question' for consideration here" (Opp. 1);[1] since Questions 1 (a) and (b) and Ques-

[1] Throughout this reply "Pet." will refer to the petition for certiorari; "App." will refer to the appendix to the petition for certiorari; and "Opp." will refer to Great Coastal's Brief in Opposition. In referring to the record in the court below, we will use the same designation as in the Petition (Pet. 3, n.*), except, of course, when quoting Respondent.

POOR COPY

tion 2 are drawn directly from the Court of Appeals' rulings, see Pet. 12 (describing the opinion below) and our explicit discussion of that opinion throughout our argument, the questions presented are very much in this case, and cannot be wished away.[2] On the other hand, the opinion of the Court of Appeals will be searched in vain for a discussion of the well-established principles of the law"[3] or the "uncontested set of facts"[4]

---

[2] Respondent also says that "[t]he argument which is now made to this Court in the Union's Petition was added in that appeal, but was little more than 'makeweight.'" (Opp. 15, n. 1. While it is jurisdictionally sufficient that the issues raised in the petition were presented and decided in the Court of Appeals, we note that each was fully briefed and argued.

Nor is there anything "bizarre" (Opp. 15) about our not raising here the issue of the International's responsibility. In denying the petition for rehearing the Court abandoned the *per se* rule which we had challenged on the appeal, and rested its affirmance on this issue instead on the Trial Court's instruction to the jury (App. 33a-34a, which is omitted from the string of references at Opp. 20, n. 1). Because we were in doubt as to whether objection to that instruction had been properly preserved, we restricted our petition in this Court to those serious errors of general importance as to which no technical objection could possibly be raised.

[3] The reference here is apparently to the "established principles" enunciated at Opp. 16-19 dealing with the scope of § 8 (b)(4)(B). The Court of Appeals' opinion does not discuss this subject at all.

What is not clear is whether by "established principles" respondent refers to the statements of law in the five cases which it quotes, and which we accept, or respondent's own statement of the law as it applies to this case (Opp. 17), which is plainly wrong. What respondent is pleased to call "the 'hot cargo' letters sent by the Union to Great Coastal's customers" (described at Pet. 4), were clearly lawful under this Court's decisions cited at Pet. 27, n. 14, and a decision by the National Labor Relations Board with respect to an almost identical letter sent out by the same local union, *Estes Express Lines*, 181 NLRB 790. The Board there held also that such a letter "by assuring the neutral employers that any such picketing would meet Moore

BLEED THROUG

**which, according to respondent (Opp. 1-2), the decision below involves. We therefore turn to respondent's argument with respect to the individual questions.**

---

Dry Dock standards, and by disclaiming any intention to threaten the neutral, negates any unlawful secondary objevtive" (*Id.* at 791).

The proposition that ambulatory picketing is not necessarily lawful even if it complies with *Moore Dry Dock* standards (Opp. 17) if sound, avails respondent nothing; contrary to its assertions, we raise no *Moore Dry Dock* issue in this Court. What matters is that ambulatory picketing is not per se *illegal*, as respondent implicitly concedes. Its illegality turns on its objective, that is, whether it is to induce the secondary employees not to aid the primary employer in its day-to-day operations, here by refusing to load or unload Great Coastal's freight (legal), or to engage in a more general work stoppage (illegal). *Steelworkers* v. *Labor Board*, 376 U.S. 492, 499; *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-390; *NLRB* v. *Operating Engineers*, 400 U.S. 297, 304.

[4] The reference here appears to be to the assertion at Opp. 2 which we quote and refute at pp. 6-7 *infra*. Throughout its brief respondent describes other facts or evidence as "undisputed". But given the rule of *Carrier*, and respondent's assertion that all its damages flowed from ambulatory picketing, the only material factual issue is whether it is *undisputed* that the defendants induced secondary employees to "respect" the picket lines by engaging in general work stoppages in their presence or only refrain from loading or unloading Great Coastal freight. Respondent quotes, out of context, a statement by Hodson given at the first trial: "If they respected the picket line they wouldn't be working (426)" (Opp. 12). This omits the colloquy immediately thereafter, where plaintiff's counsel clarifies the matter:

> "Q. Wouldn't be loading and unloading Great Coastal trucks? A. No, sir." (I JA 426-427)

We reproduce in Appendix A, *infra*, Hodson's testimony on this subject at the second trial in which the limited scope of the inducement is clear beyond capacity to pervert. Plaintiff's counsel himself there said:

> "If the employees, union members, who were working for Great Coastal's customers, cooperated they wouldn't load or unload, isn't that right? We have already established it once." (II JA 890)

POOR COPY

## ARGUMENT

**Reply with Respect to Question I(a):**

We agree that the District Judge determined only that the jury had been prejudiced in its consideration of damages, as shown by the excessive verdict. But from this determination, it followed as a matter of law, under the decisions of this Court and the other authorities cited as Pet. 19-20, that defendant was entitled to a new trial on all issues. Respondent surmises that the trial judge believed that the verdict on liability was not similarly infected. But *Gasoline Products* and the lower court cases applying that precedent establish that a partial new trial is not permissible unless there is no doubt that the jury's verdict on one issue is uninfluenced by its errors with respect to other issues. (Pet. 21-22, cf. Pet. 32) Surely, it is "a rational explanation for"[5] the action of a jury which, because of improper evidence of violence, renders an award 50% greater than the plaintiff's demand or the evidence will tolerate, that it was likewise improperly influenced in deciding that the defendant was liable, the essential pre-

---

[5] The phrase is that of the Fifth Circuit in an opinion of April 15, 1976, on denial of rehearing in *Jamison Co., Inc.* v. *Westvaco Corp.*, cited at Pet. 32 and quoted id. at n. 18. The Court said:

> "We cannot be certain that this account accurately represents the jury's intention in responding as it did. In order to require retrial as to all issues, however, we need only conclude that the above presents a rational explanation for the jury's action." (Fifth Circuit slip ops. 2896, 2898).

Immediately thereafter the *Jamison* opinion quoted with approval the first two sentences of the passage of the District of Columbia Circuit's opinion in *Camalier and Buckley, etc.*, quoted at Pet. 21, n. 10.

BLEED THROU

condition for its rendering of the excessive verdict. Indeed, we think the contrary assumption is a psychological absurdity which the law should not, and under our understanding of the decisions may not, indulge.

Respondent endorses the Court of Appeals' explanation of the jury's conduct, and says that its "view of the matter coincided with that of the Trial Court" (Pet. 22). Respondent points to nothing in the record to substantiate that assessment, in fact, the judge said nothing on the subject except what is at Pet. App. 6a-7a, which is quoted at Pet. 8-9.

All else failing, respondent contends that the trial court's ruling was correct because "the plaintiff would appear to have been entitled to a directed verdict on the liability issue." (Opp. 22). The Court of Appeals' evaluation of the state of the evidence is far different:

> "We should say here, and we emphasize, that the union does not contest the fact that there was evidence from which a jury could find an illegal secondard boycott. Indeed, the matter is admitted to be clearly a jury question. And the matter having been decided in favor of the plaintiff under proper instructions, it is, in all events, removed from our consideration. *Lavender* v. *Kurn*, 327 U.S. 645 (1946)." (App. 19a)

Additionally, that Court's ruling on rehearing International's responsibility establishes that this liability issue, too, was a jury question. Defendant was entitled to have these liability issues decided by a fair-minded jury, rather than one which rendered an admittedly excessive verdict in the teeth of the Court's instructions. Since the courts below denied defendant that fundamental right, it can be vindicated, and adherence to this Court's precedents enforced, only by the exercise of this Court's reviewing authority.

POOR COPY

**Reply with Respect to Question 1(b):**

Respondent says:

> "Of course, it is readily apparent that once again the *entire* argument is necessarily predicated upon the all-important assumption that some of the plaintiff's damages were incurred as a result of lawful strike activity, and some by admittedly unlawful secondary boycotting, and that *no* recovery could properly be had unless the plaintiff met its burden of proving what portions of its damages were proximately caused by particular acts of the Union shown to be violative of § 8(b)(4) of the Act." (Opp. 23, emphasis in original)

We accept the foregoing, with a single exception which we mention in the margin.[6] Great Coastal's principal response is to assert it to be an "unassailable fact that *all* of the plaintiff's damages were the direct and proximate result of the Union's illegal secondary boycotting, and none was caused by permissible or protected strike activity" (Opp. 23-24). We unqualifiedly dispute the assertion that this is a "fact".

This claim first appears at Opp. 2:

> "The Union never appealed from the adverse decision rendered in the Trial Court which held, upon the uncontested evidence, that all of the damages sustained by this Respondent resulted directly and proximately from widespread, persistent, and successful secondary boycotting activities with which the Union supported its strike."

---

[6] Our objection is to the phrase "were incurred". A more accurate statement of our position is that it depends on the assumption that some of the plaintiff's damages *could have been* incurred as a result of lawful strike activity. See Pet. 26-27, 29-31. That assumption is correct as a matter of law, see Pet. 27 and pp. 2-3, n.3, *supra*.

The trial court did not so hold, and respondent points to nothing in its opinion or elsewhere in the record to justify that statement. On the contrary, the District Court submitted the issue of proximate cause to the jury at the second trial, although under circumstances which made it impossible for the jury to perform that function. And even respondent does not argue that the Court of Appeals so held.

The assertion is repeated in the Statement of the Case. (Opp. 5, 14). At Opp. 5 respondent refers to various excerpts from the testimony of Great Coastal's president Estes at the second trial. For the sake of completeness we describe this testimony item by item in App. B, *infra*. The essential points, however, are 1) that Estes nowhere connects any strike activity with any loss; and 2) that Estes expressed the opinion that all his losses were caused by "secondary boycotting activities" (II JA 720), which he did not further identify. His expression of opinion, which was objected to, was not competent and the Court instructed the jury to disregard it (II JA 916). See Pet. 30, n. 15, second paragraph.

The representation that all changes flowed from "ambulatory picketing" (Opp. 5) is belied by Great Coastal's answer to interrogatories, quoted in Appendix C, *infra*, p. 6a.

Description of respondent's references at Opp. 14 is unnecessarily complicated because it has combined in a single parenthesis references to evidence on two separate subjects" boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing" (*id.*). Nevertheless,

in App. C, *infra,* we describe that evidence. It suffices to say that there is nothing which connects any, much less all, of plaintiff's losses to any activity, legal or illegal.

In sum, the "unassailable fact" (Opp. 23) is not a fact at all.

In response to Question 1(b) Great Coastal tenders two additional points. The first is that all the liability evidence was also presented to the damage jury, which therefore "did have complete knowledge of the evidence upon which the first jury found liability" (Opp. 24). The short answer is that the damage jury did not have knowledge of what incident or incidents the first jury based its liability finding. A somewhat longer and likewise conclusive answer is that there was nothing that the damage jury could usefully do with that evidence, or the knowledge that it had been before the first jury. The damage jury could not determine for itself which, if any of the strike activities were illegal, for it was not instructed to do so, nor given any basis for separating licit from the illicit. It was instructed only that it was to accept as given the union's liability for action with "certain" of Great Coastal's customers. (Pet. 10, 29-30). Nor, if it had been instructed to assess that evidence independently—that is, if it had been directed to redetermine liability—could the jury have taken the necessary next step under *Morton,* to determine which acts proximately caused loss to the plaintiff, for plaintiff steadfastly refused to introduce any evidence linking particular actions to its losses. See also Pet. 30-31.

Respondent also emphasizes the Court of Appeals' approval of the trial court's instructions. (Opp. 24) On this point we rest on the discussion at Pet. 30, n. 15.

**Reply with Report to Question 2:**

First, respondent seeks to distinguish *Teamsters Union* v. *Morton*, 377 U.S. 252, on the ground that that case was tried to the Court, whose decision, according to respondent, in effect constituted a special verdict; whereas the present case was tried to a jury and no special verdict was sought. We are quite at a loss to understand what this difference in procedure has to do with the holding of *Morton* that in a suit under § 303 the plaintiff may only recover those losses which he proves were proximately caused by a violation of § 8(b)(4), on which the decision below engrafted a devitalizing exception by a misapplication of *Story-Bigelow* (see Pet. 30-41). It is apparently Great Coastal's submission that it was relieved of the burden of proof because the defendant union did not move for a special verdict. We agree that because of the limited retrial and also because of plaintiff's strategy, to show only its total strike losses, that has been the effect of the decision below; but we emphatically dispute that this is permissible under *Morton*.

Respondent's only other argument on this point is to again observe "that in this case it was established that all of plaintiff's damages proximately resulted from conduct of the Union that violated the secondary boycott provisions of the Act" (Opp. 26). As we have felt compelled to demonstrate at perhaps excessive length, that proposition was not "established". Respondent's tireless repetition does not make it so.[7]

---

[7] In a decision reported after the Petition was filed, *Fleming Building Co., Inc* v. *Northern Oklahoma Building & Trades Council*, 91 LRRM 2794, the Tenth Circuit has joined the Second, Fifth & Ninth (see Pet. 39-40) in holding that the plaintiff in a § 303 suit must "establish the existence of damages by a preponderance of the evidence" (*id.* at 2795).

POOR COPY

## CONCLUSION

For the reasons stated in the petition and herein, the Petition for Certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037
*Attorneys for Petitioner*